

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO

3 RAQUEL RUSSO,

4  
5 Plaintiff,

6  
7 v.

Civil No. 07-2082 (JAF)

8 MUNICIPALITY OF CABO ROJO;  
9 PERSA RODRIGUEZ, Mayor of Cabo  
10 Rojo; UNITED STATES OF AMERICA  
11 (U.S. Coast Guard); JOHN DOE;  
12 INSURANCE COMPANY X,Y,Z,  
13  
14 Defendants.

15 **OPINION AND ORDER**

16 Plaintiff, Raquel Russo, brings this action against Defendants,  
17 the Municipality of Cabo Rojo ("Cabo Rojo"), Cabo Rojo Mayor Persa  
18 Rodríguez, unidentified defendant John Doe, and unidentified  
19 Insurance Company XYZ in diversity jurisdiction, under 31 L.P.R.A.  
20 § 5141 (1990), and against the United States of America under the  
21 Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-80. Docket  
22 No. 16. The United States moves to dismiss pursuant to Federal Rule  
23 of Civil Procedure 12(b)(6), Docket No. 26; Plaintiff opposes, Docket  
24 No. 27; the United States replies, Docket No. 30.

25 **I.**

26 **Factual and Procedural Synopsis**

27 We draw the following facts from Plaintiff's amended complaint.  
28 Docket No. 16. In considering a motion to dismiss, we take

1 Plaintiff's allegations as true and make all reasonable inferences in  
2 her favor. Alternative Energy, Inc. v. St. Paul Fire & Marine Ins.  
3 Co., 267 F.3d 30, 36 (1st Cir. 2001).

4 Plaintiff visited the lighthouse "Faro de los Morrillos," in  
5 Cabo Rojo, Puerto Rico, on December 7, 2006, as part of a guided tour  
6 led by an employee of Cabo Rojo. The United States Coast Guard  
7 ("USCG"), an instrumentality of the United States, owns the  
8 lighthouse. The USCG has leased the lighthouse to Cabo Rojo under  
9 terms which require the municipality to maintain the premises,  
10 indemnify the United States against damages, and maintain casualty  
11 and liability insurance. Cabo Rojo operates and administers the  
12 premises.

13 The groundskeeper of the premises met Plaintiff upon her arrival  
14 and proceeded to conduct a visit of the building. The groundskeeper  
15 invited Plaintiff to see a partially subterranean coal bunker that  
16 once held fuel for the lighthouse flame. As the groundskeeper opened  
17 the door to the bunker, he instructed Plaintiff to enter and turn on  
18 the light switch. Unable to see in the darkness, Plaintiff fell down  
19 a spiral stairwell that lacked a handrail. She suffered severe  
20 injuries which required emergency treatment at a hospital and  
21 subsequent surgery and rehabilitation. Neither the tour guide nor the  
22 groundskeeper cautioned Plaintiff of the conditions within the  
23 bunker, and no warnings were posted outside.

1 Plaintiff filed this action on November 13, 2007, Docket No. 1.  
2 The United States moved to dismiss on November 3, 2008, Docket  
3 No. 26; Plaintiff opposed on November 18, 2008, Docket No. 27; the  
4 United States replied on December 5, 2008, Docket No. 30.

## 5 II.

### 6 Sua-Sponte Dismissal under Rule 12(b)(1)

7 \_\_\_\_\_Pursuant to Federal Rule of Civil Procedure 12(b)(1), a federal  
8 district court has an independent obligation to review its subject-  
9 matter jurisdiction over all cases. Arbaugh v. Y & H Corp., 546 U.S.  
10 500, 514 (2006); see Fed. R. Civ. P. 12(h)(3). In making this  
11 determination, the court may resolve predicate facts for its  
12 jurisdiction by ordering discovery and considering evidence extrinsic  
13 to the complaint. Skwira v. United States, 344 F.3d 64, 71-72 (1st  
14 Cir. 2003).

15 We may order dismissal sua sponte if it is evident that we lack  
16 power to decide a case. See Arbaugh, 546 U.S. at 514. While prior  
17 notice to the plaintiff is ordinarily required to permit the  
18 plaintiff to correct her error, no notice is necessary "[i]f it is  
19 crystal clear that the plaintiff cannot prevail and that amending the  
20 complaint would be futile." González-González v. United States, 257  
21 F.3d 31, 37 (1st Cir. 2001).



1 Inc. v. United States, 555 F. Supp. 2d 321, 324-25 (D.P.R. 2008)  
2 (citing Lehman v. Nakshian, 453 U.S. 156, 160 (1981)); accord United  
3 States v. Mitchell, 445 U.S. 535, 538 (1980).

4 **1. Liability for Acts Attributable to Individual Actors**

5 Several circuits have held that no action may lie against the  
6 United States under the FTCA for a generalized breach of state-law  
7 duty without reference to specific actors employed by the United  
8 States. Norman v. United States, 111 F.3d 356, 358 (3d Cir. 1997);  
9 Berkman v. United States, 957 F.2d 108, 113 (4th Cir. 1992); accord  
10 Cupit v. United States, 964 F. Supp. 1104, 1112 (W.D. La. 1997).  
11 These circuits have specifically rejected general premises liability  
12 at state law as a basis for liability under the FTCA. Norman, 111  
13 F.3d at 358; Berkman, 957 F.2d at 113.

14 Although Plaintiff avers that the United States, through the  
15 agency of the USCG, owns the lighthouse, Plaintiff does not attribute  
16 her injuries to any officer or employee of the United States. Docket  
17 No. 1. As the scope of our jurisdiction is expressly limited to acts  
18 or omissions attributable to specific personnel, we lack adjudicatory  
19 power over this claim.

20 **2. Exclusion of Independent Contractors**

21 Even if we liberally construed Plaintiff's complaint to charge  
22 the United States with liability for the omission of the tour guide  
23 and groundskeeper, Plaintiff's claim would still fail. The  
24 jurisdictional definition of government employees under the FTCA

1 explicitly excludes independent contractors. 28 U.S.C. § 2671. The  
2 applicable test is whether the federal government supervises the day-  
3 to-day operations of a putative employee. Larsen v. Empresas El  
4 Yunque, Inc., 812 F.2d 14, 15 (1st Cir. 1986) (citing United States  
5 v. Orleans, 425 U.S. 807, 815 (1976)). Where a lease between the  
6 federal government and the contractor requires the lessee to maintain  
7 the premises to standards of repair and safety, indemnify the United  
8 States against any liability for damage arising from the occupancy or  
9 use of the premises, and maintain casualty and liability insurance,  
10 the lessee is deemed to be an independent contractor. Larsen, 812  
11 F.2d at 16.

12 Plaintiff alleges negligence of the tour guide and  
13 groundskeeper, both employees of Cabo Rojo, in failing to warn  
14 Plaintiff of the latent defect inside the coal bunker, and of Cabo  
15 Rojo and Defendant Rodríguez in failing to post warnings or  
16 ameliorate the hazard. Docket No. 1. There is no indication that the  
17 United States government oversees the daily activities of Cabo Rojo,  
18 its mayor, or their employees at the lighthouse. See id.; cf. Larsen,  
19 812 F.2d at 15. Furthermore, the lease between the USCG and Cabo  
20 Rojo expressly requires the municipality to maintain the premises,  
21 indemnify the United States against damages, and maintain casualty  
22 and liability insurance. Docket No. 26-2. Cabo Rojo is, therefore,  
23 an independent contractor under the FTCA, see Larsen, 812 F.2d at 16,

1 and we lack the jurisdiction to hear Plaintiff's claim against the  
2 United States, 28 U.S.C. §§ 1346(b)(1), 2671.

3 **3. Discretionary Function Exception**

4 Lastly, even if Plaintiff were to amend her complaint to allege  
5 tortious conduct by some USCG employee, her claim would still fail.  
6 The FTCA includes a broad exception for "discretionary functions"  
7 from its waiver of sovereign immunity. 28 U.S.C. § 2680(a). Where  
8 the allegedly tortious conduct or omission falls within this  
9 exception, no action may lie against the United States. Berkovitz v.  
10 United States, 486 U.S. 531, 535 (1988). To determine whether the  
11 exception applies, we "must first consider whether the action is a  
12 matter of choice for the acting employee." Id. at 536. If there is  
13 an applicable federal statute, regulation, or policy on point, the  
14 exception cannot apply as it forecloses official discretion. Id.  
15 Without specific statutory or regulatory guidance, the decision of a  
16 federal agency to lease federal property qualifies for the exception.  
17 See Bear Med. v. United States, 241 F.3d 1208, 1214 (9th Cir. 2001).  
18 The exception does not apply, however, if the government expressly  
19 undertakes an applicable obligation under the lease. Id. at 1215.

20 The USCG leased the lighthouse to Cabo Rojo for historical,  
21 educational, and environmental purposes for thirty years in 1986.  
22 Docket No. 26. None of these functions are part of the core mission  
23 of the USCG, which is maritime policing, search and rescue, and aid  
24 to navigation. See 6 U.S.C. § 468 (defining core USCG missions that

1 are to be preserved after its transfer to Department of Homeland  
2 Security). We also find no statute or regulation prescribing the  
3 manner in which the USCG should lease its properties to local  
4 governments for educational purposes. Therefore, the lease between  
5 the USCG and Cabo Rojo constituted a discretionary function of an  
6 United States agency. See Berkovitz, 486 U.S. at 536. Furthermore,  
7 the contract provides that Cabo Rojo, not the USCG, would assume all  
8 responsibility for liability from its operation as a museum, Docket  
9 No. 26-2; hence, there is no basis for jurisdiction under the lease  
10 itself. Accordingly, we cannot entertain Plaintiff's claim against  
11 the United States arising from the operation of USCG property as a  
12 tourist destination.

13 **B. Unknown Defendants**

14 Plaintiff had 120 days from the filing of her complaint to  
15 substitute unknown defendants John Doe and Insurance Company XYZ with  
16 actual defendants, unless Plaintiff provided good cause for an  
17 extension. See Fed. R. Civ. P. 4(m). This date passed on March 12,  
18 2008. Plaintiff has had ample time to amend her complaint and serve  
19 process on proper defendants, but has failed to do so without showing  
20 good cause. We, therefore, dismiss both unknown Defendants.

21 **IV.**

22 **Conclusion**

23 For the aforementioned reasons, we hereby **DISMISS**, sua sponte,  
24 Plaintiff's claim under the FTCA and all claims against unknown



1 Defendants John Doe and Insurance Company XYZ **WITH PREJUDICE.**  
2 Plaintiff's diversity-jurisdiction claims under Commonwealth law  
3 against Defendants Cabo Rojo and Rodríguez remain. We hereby **DENY** as  
4 **MOOT** the United States' motion to dismiss, Docket No. 26.

5 **IT IS SO ORDERED.**

6 San Juan, Puerto Rico, this 8<sup>th</sup> day of January, 2009.

7 s/José Antonio Fusté  
8 JOSE ANTONIO FUSTE  
9 Chief U.S. District Judge